

No.

IN THE
MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

-VS-

TIMOTHY JACKSON,

Defendant-Appellant,

ON APPEAL FROM THE THIRD JUDICIAL CIRCUIT COURT

WAYNE COUNTY CRIMINAL DIVISION

Circuit Court No. 10-13476-01

Court of Appeals No. 310177

DEFENDANT-APPELLANT'S REPLY BRIEF

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..... Appendix A

I. INTRODUCTION

A jury convicted Mr. Jackson of six counts of criminal sexual conduct in the first degree, in violation of MCL 750.520b(1), against complainant, Shania Swift, a minor and former female parishioner of his church. Based on his conviction and the duration of his sentence¹, it is likely that Mr. Jackson will spend the rest of his life behind bars, alienated from his wife and children and alienated from the church to which he dedicated his life. In his application for leave to appeal, Mr. Jackson focuses on two issues, which significantly impacted his right to a fair trial: improperly admitted character evidence under the guise of the res gestae exception and prosecutorial misconduct. Instead of responding to Mr. Jackson's application, the People have chosen to incorporate their brief on appeal, which fails to address either argument. The People's attempt to discredit Mr. Jackson's arguments by relying on a stale brief and implying through their silence that no response is necessary, is misplaced.

Without any corroborating witnesses or evidence, the case became a credibility contest between complainant and Mr. Jackson. Therefore, any evidence that could impact Mr. Jackson's credibility could have a potentially disastrous impact in tainting the minds of the jury. This is precisely what happened when the People, without notice, improperly introduced testimony regarding other bad acts that allegedly occurred between Mr. Jackson and two adult female parishioners. Without limiting instructions, the jury was free to use this testimony out of context—testimony which made Mr. Jackson seem like a bad person—the type of person who would engage in extramarital affairs and who would be more likely to prey on a young female parishioner. This evidence also allowed jurors to rely on heightened public stereotypes of pastors and sexual impropriety. These consistent negative stereotypes of pastors and church

¹ Mr. Jackson was sentenced to concurrent prison terms of 25-37 ½ years for his first three convictions (pursuant to MCL 750.520(b)(1)(a)), 15-22 ½ years for two convictions (pursuant to MCL 750.520b(1)(b)(iii)), and a consecutive prison term of 15-22 ½ years (pursuant to MCL 750.520b(1)(b)(iii)).

officials engaging in sexual misconduct are amplified by the media and disseminated onto the public for entertainment purposes without any regard for the truth or falsity of the allegations. Because of Mr. Jackson's position as a pastor, any character evidence concerning alleged sexual impropriety would be even more prejudicial because of these negative stereotypes.

The introduction of "other bad acts" evidence shifted the jurors focus away from the incredible testimony of the complainant and onto Mr. Jackson's alleged promiscuity. Although it is not the court's job to second guess decisions made by the jury, it is the court's job to ensure that inadmissible evidence is not presented or given undue weight, and, when the situation warrants, to ensure that counsel does not abuse the court rules or engage in misconduct to further their position. Any focus on the complainant's credibility was overshadowed by the blatant introduction of improper character evidence by the People. Had the jurors' minds not been tainted by improper character evidence, they would have seen the complainant for who she really was—a young girl with a troubled past and a history of lying. The complainant's unreliable statements were overstated, illogically enhanced, and corroborated by inadmissible other acts evidence. Complainant's past included altercations with her mother, an inappropriate sexual relationship with another female parishioner, and disciplinary issues at school, which resulted in an expulsion. It was complainant's troubled past that led her mother to seek Mr. Jackson's help in the first place.

Had the jury not been influenced by improper and highly prejudicial character evidence, the outcome of Mr. Jackson's case would have been different. Had the prosecutor not engaged in misconduct by introducing improper character evidence without notice, the outcome of Mr. Jackson's case would have been different. And had the court not misapplied the res gestae exception to justify admissibility of improper character evidence, Mr. Jackson's case would

have been different. Therefore, Mr. Jackson respectfully maintains that his conviction should be reversed, or at a minimum, the case should be remanded back to the circuit court for a new trial.

II. REPLY ARGUMENT

A. ALTHOUGH THE PEOPLE HAVE CHOSEN NOT TO ADDRESS THE ARGUMENTS RAISED IN MR. JACKSON'S APPLICATION—IMPROPER OTHER ACTS EVIDENCE AND PROSECUTORIAL MISCONDUCT—THESE ARGUMENTS DEMONSTRATE THAT MR. JACKSON WAS DENIED HIS RIGHT TO A FAIR TRIAL AND THAT THE COURT OF APPEALS ABUSED ITS DISCRETION BY FAILING TO RECOGNIZE THE SEVERITY OF THESE ERRORS WHEN IT AFFIRMED MR. JACKSON'S CONVICTION.

The People's brief on appeal does not address these arguments; however, Mr. Jackson will take their silence as an opportunity to expand and clarify the significance of these issues and to explain why reversal is warranted in his case.

The issue of improper character evidence was preserved by trial counsel's objection to "other acts" evidence and addressed in Mr. Jackson's initial appeal brief. This evidence consisted primarily of testimony by complainant's aunt, Jacklyn Price, who testified that Mr. Jackson engaged in adulterous relationships with both herself and a former parishioner, Latoya Newsome. Ms. Newsome did not testify and could not be located. Trial counsel objected to the introduction of other acts evidence and moved twice for mistrial. The evidence was improper and was introduced without notice to the defense. Additionally, this evidence is irrelevant and inadmissible pursuant to MRE 403. It does not make a fact more likely than not. Further its prejudicial effect far outweighs probative value. It had no probative value. Instead, the evidence improperly allowed jurors to draw inferences and conclusions from stereotypes, dissimilar acts, and other impermissible sources.

Mr. Jackson's trial counsel objected to the introduction of this improper character evidence. However, trial counsel's objection was disregarded by the trial court, which found trial counsel's conclusion that the testimony amounted to improper character evidence to be a

“quantum leap.” [Trial Transcript, 3-21-12, Vol. 3, p. 174 ¶ 19-20]. On appeal, the Court of Appeals found that this testimony did, in fact, constitute other acts evidence, proving that trial counsel’s conclusion and objection were more than just a “quantum leap.” Despite finding the testimony to be other acts evidence, the Court of Appeals permitted its use under the res gestae exception, reasoning that it allowed the jury to hear the “complete story.” In his concurring opinion, Justice Shapiro criticized the application of the res gestae exception and the prosecutor’s failure to provide notice in advance of trial, but found these errors harmless. (A copy of Justice Shapiro’s concurring opinion, dated April 10, 2014, is attached as **Appendix A**). Mr. Jackson encourages this Court to take Justice Shapiro’s concurring opinion one step further and find that the error was not harmless—it severely prejudiced Mr. Jackson’s case.

As explained more fully in Mr. Jackson’s application, the Court of Appeals abused its discretion when it excused improper character evidence under the res gestae exception. Res gestae evidence is permissible in order to provide the jury with a complete story. However, in this case, Ms. Price’s testimony regarding Mr. Jackson’s alleged relationships with other adult female parishioners, including herself, was completely unrelated to the criminal sexual conduct charges Mr. Jackson faced against complainant, who was a minor at the time. The only purpose of the testimony was to show that Mr. Jackson had a propensity to act immorally and to taint the minds of the jurors with bad character evidence. The central issue with such testimony is that it “is said to weigh too much with the jury and to so over-persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Michelson v. United States*, 335 U.S. 469, 475 (1948). *See also, Accord People v Crawford*, 458 Mich 376, 383-84 (recognizing that the character evidence prohibition is deeply rooted in our

jurisprudence and that it “reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence”) (internal citation omitted).

Moreover, the *res gestae* exception has been discredited and critiqued by a number of jurisdictions, including courts in Michigan. *See, e.g., People v Bowers*, 136 Mich App 284, 293; (1984) (rejecting application of *res gestae* exception); *People v Stoker*, 103 Mich App 800; 303 NW2d 900 (1981) (also rejecting *res gestae* exception). *See also, United States v Green*, 320 F3d 452 (3rd Cir 2003) (observing the test to determine when other-acts evidence is admissible under the *res gestae* exception “creates confusion because, quite simply, no one knows what it means” and finding the standard to be “vague, overbroad and prone to abuse”); *United States v Bowie*, 232 F3d 923 (DC Cir 2000) (expressing concern that the *res gestae* exception undermines Rule 404(b)); *United States v Boone*, 628 Fed 927 (7th Cir 2010) (recognizing that the *res gestae* exception has outlived its usefulness).

In *People v Bowers*, 136 Mich App 284, 293 (1984), the Court of Appeals held that the trial court improperly admitted testimony concerning other acts evidence under the *res gestae* exception and that the error was not harmless. Defendant Bowers had been convicted of breaking and entering an occupied dwelling with intent to commit larceny and sentenced to a term of 6 to 15 years of incarceration. The prosecution introduced evidence that on the same night of the break in that a neighbor’s vehicle was stolen and found within miles of defendant’s residence. The court held that the defendant was denied a fair trial by the introduction of this evidence, and reasoned, “it was error to allow the introduction of evidence concerning a separate and unrelated criminal offense absent some proof that the individual on trial for the primary offense (here, breaking and entering) had in actuality committed the other criminal activity” (vehicle theft). *Id.* at 296. The court further reasoned, “[s]upposition and speculation that both

crimes are related are insufficient to warrant the introduction of such highly prejudicial evidence.” *Id.* Ultimately, the court rejected the res gestae exception and remanded the matter for a new trial.

Likewise, in *People v Stoker*, 103 Mich App 800 (1981), the introduction of evidence showing that defendant was in possession of several different identification cards at the time of his arrest for armed robbery and felony-firearm was held to be reversibly erroneous and not within the res gestae exception. The Court of Appeals found that the relevance and probative value of the evidence was suspect considering the absence of proof that the identification cards had been stolen. *Id.* at 808. Given the obvious prejudicial impact of the evidence and the fact that the prosecutor had clearly implied during his examination of the witnesses and during closing argument that the items were stolen, reversal was required. Moreover, it was determined that the evidence concerning the status of the items as stolen property was too speculative and the Court held that injection of this evidence operated to deprive defendant of a fair trial.

The prosecution in Mr. Jackson’s case, like the prosecution in *Bowers* and *Stoker*, improperly admitted evidence of other crimes or wrongs—testimony implying that Mr. Jackson engaged in multiple inappropriate sexual relationships with parishioners—denied Mr. Jackson a fair trial. The prosecution did not offer any evidence to substantiate these claimed other acts, and no limiting instructions were provided to limit the scope in which this testimony could be used by the jury. The admission of other acts evidence condemned Mr. Jackson’s character and credibility in the minds of the jury. The prejudicial effect of admitting this evidence is significant, especially taking into consideration the lack of corroborating witnesses or evidence in this case. Accordingly, this Court should reverse Mr. Jackson’s conviction, or in the alternative, remand for a new trial.

B. THE PROSECUTOR ENGAGED IN PROSECUTORIAL MISCONDUCT BY FAILING TO PROVIDE NOTICE PRIOR TO INTRODUCING IMPROPER CHARACTER EVIDENCE AND BY BLATANTLY DISREGARDING THE COURT RULES AND DEFENDANT'S RIGHT TO A FAIR TRIAL.

When the prosecution employs unfair tactics to gain an advantage, it deprives the defendant of his right to a fair trial under the federal and Michigan Constitutions. US Const amend XIV; Mich Const 1963, art 1, § 17. The risks of miscalculating the effect of uncharged misconduct evidence can be great. One court has described the testimony as “the most prejudicial evidence imaginable against an accused.” *People v Smallwood*, 722 P2d 197, 205 (1986). The result of this case would have been different had damaging character evidence not been introduced by the prosecutor.

The prosecutor's misconduct is two-fold. First the prosecutor failed to provide notice of an intent to introduce character evidence; and second, the prosecutor introduced improper character evidence. Mr. Jackson's trial counsel objected to the lack of notice and to the prosecutor's line of questioning, and moved for mistrial twice based on the testimony elicited by the prosecution, thereby preserving appellate review. Specifically, the prosecutor knowingly proceeded down a line of questioning in order to elicit impermissible character evidence during Ms. Price's testimony. This line of questioning involved Ms. Price's and Ms. Newsome's alleged relationships with Mr. Jackson. More specifically, Ms. Price testified that Ms. Newsome had contacted her on Facebook several years after leaving the church and allegedly revealed that she and Mr. Jackson had an inappropriate relationship. [Trial Transcript, 3-21-12, Vol. 3, p. 157]. According to Ms. Price, it was Ms. Newsome's Facebook message that prompted her to reach out to complainant. [Trial Transcript, 3-21-12, Vol. 3, p. 157-159, p. 161 ¶ 17]. Ms. Price also provided testimony regarding her own consensual extramarital relationship with Mr. Jackson, which she stated involved kissing and having petting. This testimony was irrelevant to

the allegations of CSC-1 against complainant, Shania Swift, a minor. It had nothing to do with the charges that Mr. Jackson faced and was elicited for the sole purpose of introducing inappropriate character evidence.

Defense counsel objected to this evidence and argued that the prosecutor was “trying . . . to get in the supposed . . . other act evidence without ever having filed proper notice with the court and allowing us to have a hearing on it.” [Trial Transcript, 3-21-12, Vol. 3, p. 170 ¶ 11-18]. Outside the presence of the jury, defense counsel instructed the trial court that “the jury now knows that not only did Ms. Newsome supposedly make some accusations against my client, but so did this witness [referring to Ms. Price].” [Trial Transcript, 3-21-12, Vol. 3, p. 171 ¶ 6-14]. The prosecutor argued, without authority, that because Ms. Price and Ms. Newsome were adults when the alleged acts occurred that the acts did not fall within the scope of other acts evidence, which is completely nonsensical. The prosecutor further argued that the testimony was relevant because it allowed the jury to understand why Ms. Price did the things that she did. [Trial Transcript, 3-21-12, Vol. 3, p. 178]. However, this testimony was irrelevant and unnecessary. Why Ms. Price approached complainant had absolutely nothing to do with the CSC-1 charges that Mr. Jackson faced. Moreover, any relevance, however slight, regarding why Ms. Price approached the complainant was substantially outweighed by the prejudicial effect that the other acts testimony had on the jury. Unfortunately, the trial court agreed with the prosecutor’s reasoning and the Court of Appeals affirmed the admission of this improper character evidence under the res gestae exception.

Mr. Jackson respectfully maintains that the prosecutor’s direct-examination of Ms. Price resulted in the admission of inadmissible character evidence under MRE 404(b), which should not be excused under the res gestae exception. The prosecutor admitted an intent to elicit this

testimony and failed to provide the requisite notice. The failure to provide notice was not harmless and resulted in the admission of inadmissible evidence, interfered with defense counsel's ability to refute the evidence effectively and prevented counsel from timely calling rebuttal witnesses. Most significantly, this evidence tainted the jury's perception of Mr. Jackson.

It is patently improper for a prosecutor to provoke improper character evidence from a witness because of the risk that such evidence will irreversibly taint the jury and prejudice a defendant's case. See, e.g., *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996) (requiring reversal in a criminal sexual conduct case based on the prosecutor's repeated elicitation of references to defendant's previous beatings of his wife, where the prosecutor explicitly offered the evidence to show defendant's character, and where the evidence was more prejudicial than probative); *People v Carpenter*, 120 Mich App 574, 580 (1982) (holding that the prosecutor's inquiry into a prior arrest that did not result in a conviction was obviously calculated to bring the arrest to the jury's attention, and was reversible even absent defense counsel's objection); *People v Carner*, 117 Mich App 560, 573 (1982) (holding that reversal was required where the prosecutor's questions were severely prejudicial to defendant and admonishing the trial court for failing to exercise any discretion to exclude inflammatory material concerning other alleged acts of sexual abuse by defendant which did not involve complainant).

The prosecutorial misconduct in this case denied Mr. Jackson his right to a fair trial and thus his conviction should be reversed. At a minimum, this case should be remanded back to the circuit court for a new trial.

III. CONCLUSION

Based on the forgoing reasons and Defendant's application for leave to appeal, Mr. Jackson respectfully requests that this Honorable Court grant his application for leave to appeal.

Respectfully submitted:

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